



Iowa Department of
Administrative Services

General Services Enterprise

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Subject: Review Request Response

Question #1 – What weight should be given to a preference for an Iowa-based company in service contracts?

Service Contracting is authorized by Governor's Executive Order Twenty-Five which states that state agencies are authorized to contract for services that promote the policies of the agency and serve the best interest of Iowans. It provides that:

- ❑ All agencies in the executive branch of state government shall procure services in accordance with Iowa Code Sections 8.47 and 18.3 (Now 8A), and all administrative rules developed in accordance with the Iowa Accountable Government Act.
- ❑ All agencies in the executive branch shall procure services in a manner that facilitates cooperative service purchasing across state government whenever possible. The goal of this enterprise-wide approach shall be to reduce waste, duplication, and inefficiency in procurement of services across state government, and to achieve the best value for public funds expenditures.
- ❑ All agencies in the executive branch of state government are encouraged to consider purchasing services from targeted small businesses in accordance with the provisions of Iowa Code sections 73.15 through 73.21.
- ❑ All agency employees who engage in contracting for services shall receive procurement training from the Department of Personnel (Now Department of Administrative Services – Human Resources Enterprise), in partnership with other agencies. The agencies designed by the governor's office to provide procurement training shall develop programming that addresses issues pertinent to service contracting, which shall include, but not be limited to, competitive selection, contract development, contract negotiation, performance measures, and contract monitoring.

- ❑ Upon request the Department of General Services (Now Department of Administrative Services) may assist state agencies that contract services by managing the selection process, and providing technical advice or facilitating the selection process.
- ❑ Agencies are encouraged to submit to a periodic review by the state auditor of services contracting procedures to assess whether the agency is compliant with Iowa Code sections 8.47 and 18.3 (Now 8A.), and all administrative rules developed in accordance with the Iowa Administrative Procedure Act.

The elements of 8A.311(1) relates to preferences and reciprocal application and reads: “All equipment, supplies, or services procured by the department shall be purchased by a competitive bidding procedure. However, the director may exempt by rule purchases of noncompetitive items and purchases in lots or quantities too small to be effectively purchased by competitive bidding. *Preference shall be given to purchasing Iowa products and purchases from Iowa-based businesses if the Iowa-based business bids submitted are comparable in price to bids submitted by out-of-state businesses and otherwise meet the required specifications. If the laws of another state mandate a percentage preference for businesses or products from that state and the effect of the preference is that bids of Iowa businesses or products that are otherwise low and responsive are not selected in the other state, the same percentage preference shall be applied to Iowa businesses and products when businesses or products from that other state are bid to supply Iowa requirements.*” (Emphasis added)

Thus, DAS/GSE – Purchasing has established the following administrative rules relating to preference: Iowa Administrative Code 11-105.5(8A) – Preferred products and vendors reads as follows:

105.5(1) Preference to Iowa products and services.

a. All requests for proposals for materials, products, supplies, provisions and other needed articles and services to be purchased at public expense shall not knowingly be written in such a way as to exclude an Iowa-based company capable of filling the needs of the purchasing entity from submitting a responsive proposal.

b. The department and state agencies shall make every effort to support Iowa products when making a purchase. Tied responses to solicitations, regardless of the type of solicitation, shall be decided in favor of the Iowa products. Tied bids between Iowa products shall be decided in accordance with 105.12(4).

105.5(2) Preference for Iowa-based businesses. The department and state agencies shall make every effort to support Iowa-based businesses when making a purchase. Tied responses to solicitations, regardless of the type of solicitation, shall be decided in favor of the Iowa-based business. Tied bids between Iowa-based businesses shall be decided in accordance with 105.12(4).

105.12(4) Tied bids. An award shall be determined by a drawing when responses are received that are equal in all respects and tied in price. When ever, it is practical to do so, the drawing will be held in the presence of the vendors who are tied in price. Otherwise the drawing will be made in front of at least three noninterested parties. All drawings shall be documented.

When ever a tie involves an Iowa vendor and a vendor outside the state of Iowa, the Iowa vendor will receive preference. Whenever a tie involves one or more Iowa vendors and one or more outside the state of Iowa, the drawing will be held among the Iowa vendors only. Tie bids involving Iowa produced or Iowa manufactured products and items produced or manufactured outside the state of Iowa will be resolved in favor of the Iowa product.

Thus, if a percentage preference is utilized by a state agency for an Iowa based business that agency has created a reciprocal application that can be used against Iowa based businesses in any state's bid processes.

The fact that a business is located in Iowa is not a determinate factor except in the event of a tied bid situation.

Question #2 – What weight should be given to the low bid in a service contract when all bidders are deemed competent to provide the service?

Based upon the evaluation criteria established for the process i.e. number of points assigned for the cost proposal, the simplest is usually that the cost proposals will be ranked from the cheapest to the most expensive. The cheapest shall receive the maximum number of points available in this section. To determine the number of points to be awarded all other cost proposals, the cheapest bid will be used in all cases as the numerator. Each of the other bids will be used as the denominator. The percentage will then be multiplied by the maximum number of points and the resulting number will be the cost points awarded to other compliant vendors. Example: Costs equal 50 points

Vendor A quotes \$35,000

Vendor B quotes \$45,000

Vendor C quotes \$65,000

Vendor A: $\frac{\$35,000}{\$35,000} =$ receives 100% of available points on cost or 50 points.

Vendor B: $\frac{\$35,000}{\$45,000} =$ receives 78% of available points on costs or 39 points.

Vendor C: $\frac{\$35,000}{\$65,000} =$ receives 54% of available points on cost or 27 points.

Any percentage expressed as ratio will be rounded to the nearest two decimal point place. Percentages and points will be rounded to the nearest whole value.

The majority of services contracts are conducted by use of a competitive RFP (request for proposal) process. The evaluation and award criteria of an RFP process include other factors that will be considered in the selection of the contractor in addition to cost. Costs are not the sole evaluation criterion for award.

Question #3 – Must a bidding process include an intra-agency appeal process for bidders who are aggrieved or adversely affected? The process established by the DNR does not include an agency appeal; however, judicial review of the process would be available under 17A.19, Iowa Code.

The only "Service Contracting Guide" reference to unsuccessful vendors' appeal rights is denoted in the sample notice of intent to award letters. And states the following: "If your agency has administrative rules addressing the unsuccessful vendor's appeal rights, you should include a provision advising the vendors of the appeal rights and the time frame in which they must file their appeal. For example: "this Notice of Intent to Award" starts the [number of days provided for in agency's rules] day period in which an unsuccessful vendor may file a vendor appeal pursuant to [chapter] Iowa Administrative Code [section number]."

Question #4 – May a person who has been a participant in the decision-making process that created a program later bid on the service contract to administer that program?

The “Service Contracting Guide” addresses this issue in first chapter under section 1.6 – Service Provider Conflicts of Interest. It states the following:

“Agencies need to provide a level playing field to all potential Service Providers that may want to respond to a competitive selection process. Potential Service Providers may have conflicts of interest that could make the playing field “un-level” if they are not addressed. Occasionally a conflict of interest is severe enough to disqualify a potential Service Provider from being eligible to receive a contract, but it is often possible to ensure a level playing field without disqualifying a potential Service Provider. As a result, it is important that you think about whether there are any potential conflicts of interest and deal with them *before* you issue an RFP or other competitive selection process. If you are using the Department of General Services (Now DAS – General Services Enterprise) to procure the services, you must disclose any potential conflicts of interest to the DGS purchasing officer. You may also need to discuss these issues and possible ways to resolve them with your Agency’s assistant attorney general.

Here are some examples of potential conflicts:

❑ **Service Provider Helped Set the Ground Rules**

One type of conflict occurs if the Service Provider had an opportunity to influence the selection process. For example, if you used a Service Provider to help you write an RFP, that Service Provider might have an unfair advantage over other potential Service Providers because the service provider who wrote the RFP for you could have written the RFP in a way that favors itself. The major concern with this type of conflict of interest is that one potential Service Provider has the opportunity to set the ground rules by which all of the competitors for the contract will be judged, but it also gives that Service Provider more time to put together its proposal than other competitors have. This same problem may exist if you sought the input of some, but not all, potential service providers while working on the scope of work for your solicitation document.

Ideally, you should consider this issue before you hire a Service Provider to help Provider to help you write an RFP or before you start seeking information from potential Service Providers about what type of services are available. If you hire a service Provider to help you write an RFP, it is only fair to tell that Service Provider up front that it will not be able to submit a proposal in response to the RFP. One way to try to avoid these problems is to issue a Request for Information (RFI) that you make available to all potential Service Providers. RFI’s may sometimes help to “undo” an appearance of a possible conflict if you received information from some potential service providers while you were working on your RFP (or other competitive selection document). A sample RFI is included in this Guide at Appendix O.

❑ **Service Provider has Access to Nonpublic Information**

A second type of conflict of interest occurs when, for some reason, one potential Service Provider has access to nonpublic information that would give it a “leg up” on the competition. This type of concern is sometimes implicated when an Agency has had a contract for services with a service Provider and it is time to re-bid that contract. One way to deal with this problem is to make the information (or as much of it as possible) available to the other potential Service Providers so that all potential Services Providers have access to the same information. You might establish a resource Room containing a copy of the existing contract and all other materials that would be relevant to the existing contract and the project so that other Service Providers have an opportunity to review that information and to be on a more level playing field with the incumbent

Service Provider. On some very complex RFP's it might be essential that Service Providers review the information in the Resource Room in order to write an effective proposal. In those cases, you might want to make it a mandatory RFP requirement that prospective Service Providers use the Resource Room.

❑ **Service Provider Evaluation of itself**

A third type of conflict of interest occurs when a Service Provider's work under one government contract might require evaluation of its own performance under another government contract. In this situation it may not be possible to alleviate the conflict, and the service Provider may be precluded from submitting a proposal. If you have any doubts or concerns about this type of situation, you should discuss them with your legal counsel.

❑ **Service Provider Relationship with a State Employee**

Another type of conflict of interest arises when a state employee has relationship with a potential services provider. Examples of these conflicts include when a potential service provider is a business run on the side by a state employee who works for the agency purchasing the services or when the potential service provider is owned by a family member of the state employee who is in a position to influence the selection process. Information on addressing conflicts of interest involving state employees is included in section 1.5 of this Guide.

There may be other fact-specific situations that raise the question of whether there is a level playing field for the potential competitors for a contract. You should talk to your Agency's assistant attorney general and/or DGS purchasing officer you are working with if you have any concerns that a particular procurement situation does not seem entirely fair to you. As discussed above, it is often possible to address apparent inequities in a way that will not disqualify potentially well qualified services providers from submitting proposals if you deal with them head on before you begin the process.